

STATE OF MICHIGAN
IN THE SUPREME COURT

In re REQUEST FOR ADVISORY OPINION
REGARDING CONSTITUTIONALITY OF
2005 PA 71

SC: 130589

BRIEF AMICI CURIAE OF MICHIGAN COUNTY CLERKS
LAUREL J. BREUKER, NEWAYGO COUNTY,
MIKE BRYANTON, INGHAM COUNTY,
CATHY M. GARRETT, WAYNE COUNTY,
MARY HOLLINRAKE, KENT COUNTY,
SUSAN KALTENBACH, SAGINAW COUNTY,
LAWRENCE KESTENBAUM, WASTENAW COUNTY,
AND DANIEL C. KRUEGER, OTTAWA COUNTY,
AND MICHIGAN CITY AND TOWNSHIP CLERKS,
CHRIS BEDFORD, CITY OF ROCKFORD,
JUDY A. BIGNEY, ALGOMA TOWNSHIP,
KAREN BROWER, CITY OF EAST GRAND RAPIDS,
MARILYNN CROSBY, COURTLAND TOWNSHIP,
LINDA L. MATZ, OAKFIELD TOWNSHIP,
MARY MEINES, CITY OF GRANDVILLE,
SUSAN L. MORROW, PLAINFIELD TOWNSHIP,
CRYSTAL OSTERINK, GAINES TOWNSHIP,
BONNIE L. SHUPE, CANNON TOWNSHIP,
CHRIS SWOPE, CITY OF LANSING,
AND JEAN WAHLFIELD, ALPINE TOWNSHIP

SACHS WALDMAN, P.C.
By: MARY ELLEN GUREWITZ (P25724)
Attorneys for Laurel J. Breuker, Mike Bryanton,
Cathy M. Garrett, Mary Hollinrake, Susan
Kaltenbach, Lawrence Kestenbaum, Daniel C.
Krueger, Chris Bedford, Judy A. Bigney, Karen
Brower, Marilynn Crosby, Linda L. Matz, Mary
Meines, Susan L. Morrow, Crystal Osterink,
Bonnie L. Shupe, Chris Swope, and Jean
Wahfield
1000 Farmer Street
Detroit, MI 48226
(313) 965-3464

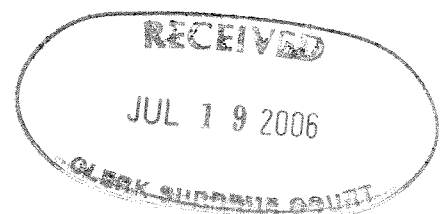


TABLE OF CONTENTS

	page
STATEMENT OF INTEREST OF AMICI CURIAE	1
INTRODUCTION	2
ARGUMENT	3
I. Election Administration in Michigan	3
II. Education of Voters as to the Photo Identification Requirement	5
III. Obtaining an Official State Personal Identification Card Will Be Time Consuming	7
IV. Education and Training of the Elections Inspectors	9
CONCLUSION AND RELIEF SOUGHT	12

STATEMENT OF INTEREST OF AMICI CURIAE

This Court is considering the constitutionality of 2005 PA 71, a statute which would require voters to present photo identification in order to vote in Michigan. The amici curiae are clerks in Michigan counties, Laurel J. Breuker, Newaygo County, Mike Bryanton, Ingham County, Cathy M. Garrett, Wayne County, Mary Hollinrake, Kent County, Susan Kaltenbach, Saginaw County, Lawrence Kestenbaum, Washtenaw County, and Daniel C. Krueger, Ottawa County, and clerks in Michigan cities and townships, Chris Bedford, City of Rockford, Judy A. Bigney, Algoma Township, Karen Brower, City of East Grand Rapids, Marilyn Crosby, Courtland Township, Linda L. Matz, Oakfield Township, Mary Meines, City of Grandville, Susan L. Morrow, Plainfield Township, Crystal Osterink, Gaines Township, Bonnie L. Shupe, Cannon Township, Chris Swope, City of Lansing, and Jean Wahfield, Alpine Township.

They are responsible for election administration in their counties, cities and townships. They seek to increase voter turnout and are responsible for voter education. They also have responsibility for hiring and training elections inspectors, those workers who conduct elections in the thousands of precincts in the cities and townships of the state.

They file this brief not to address the substantive merit of the photo identification requirement but only to address the timing of the implementation of that requirement, should it be held constitutional. They believe that the requirement could only be implemented after extensive voter education and after training of the elections inspectors. They file this brief amici curiae to bring to the attention of the court their unique perspective as public servants responsible for the conduct of elections.

INTRODUCTION

This Court is considering the constitutionality of the statutory requirement, set forth in MCL168.523, that voters, before receiving a ballot at the polling place, identify themselves by presenting an official Michigan state identification card, a Michigan driver's license, or some other generally recognized photo identification card. This requirement, originally enacted by 1996 PA 583, was declared unconstitutional in Op.Atty.Gen.1997, No. 6930, and was never implemented. It was then reenacted by the legislature in 2005 PA 71, which will take effect on Jan. 1, 2007. It has been suggested that should this Court reject the reasoning of the Attorney General's opinion regarding 1996 PA 583, and declare the more recently enacted statute to be constitutional, such a decision might be construed as a determination that the earlier enacted statute was also constitutional, which could permit or require it to be immediately implemented, prior to the Jan. 1, 2007 implementation date for 2005 PA 71 and prior to the November, 2006 election.

The undersigned county, city and township clerks believe that if such rapid implementation of the photo identification requirement were required it would be seriously detrimental to the interests of the citizens of Michigan for the reasons we will discuss.

ARGUMENT

I. Election Administration in Michigan

Election administration responsibilities in Michigan are very widely dispersed. The election law imposes election administration responsibilities on the Secretary of State, generally acting through the Bureau of Elections and its head, the Director of Elections, on boards of county election commissioners,¹ boards of county canvassers, county clerks, boards of city and township election commissioners,² boards of city and township canvassers, on other city and township legislative bodies, and on city and township clerks. The greatest responsibility for election administration rests with the county clerks and with city and township clerks.

The Secretary of State is responsible for issuing instructions and rules for the conduct of elections, for advising and directing local elections officials, and for publishing and furnishing to each election precinct a manual of instructions for the conduct of the election, including procedures and forms for processing challenges. MCL 168.31. The Department of State publication, "Managing Your Precinct on Election Day, Election Inspector's Procedure Manual," is the manual prepared in accordance with this statutory directive. It is the principal training document for elections inspectors and it is the resource used in every precinct by the elections inspectors to direct and guide their work, although

¹ Each county has a board of county election commissioners consisting of the chief judge of the probate court, the county treasurer, and the county clerk. MCL 168.23.

² Each city has a board of city election commissioners, consisting, unless otherwise provided by city charter, of the city clerk, city attorney and city assessor. MCL 168.25. Each township has a board of township election commissioners, consisting of the township supervisor, treasurer and clerk. MCL 168.26.

many other training documents are also prepared and used.

Election inspectors, the people who actually conduct the elections in the precincts on election days, are hired, supervised and paid by the city and township clerks. MCL §§ 168.674, 682 and 683. Training is multi-leveled. The Director of Elections has responsibility for training county clerks and city and township clerks. MCL 168.33. County clerks are responsible for training election inspectors in their counties, although jurisdictions with populations of more than 10,000 people have the option of conducting the training themselves and generally they do so. MCL 168.683. Election inspectors must attend training at least once every two years and must satisfactorily pass an examination, which is subject to the approval of the Secretary of State, and given by the city or township election commission. MCL 168.683. The June, 2004 edition of the Department of State Election Inspectors' Procedure Manual, referenced above, has already been distributed to the county, city and township clerks and used by them in training for the August, 2006 primary and the November, 2006 general elections. Training and testing for elections inspectors is generally conducted once in an election season, prior to the August primary for both the primary and the subsequent November general elections.

Maintenance of the qualified voter file (the QVF) is a responsibility which is shared at several levels of government but it is a principal concern of the city and township clerks. Registration can be done with the city or township clerk in the jurisdiction where the voter resides, at an office of the Secretary of State, or at other governmental offices, or by mail. The registration record is then forwarded to the city or township clerk. MCL 168.500a and 168.500b. That clerk sends a voter identification card to the voter. MCL 168.500c. That clerk also notifies the voter of any changes in his or her precinct or polling location.

City and township clerks are responsible for receiving absent voter ballot applications, for sending absent voter ballots to those qualified voters who have requested them, and for receiving the ballots back and insuring that they are properly counted. Prior to each election they print from the QVF the polling list for each precinct, which shows the name, address and date of birth of the voters in the precinct.

When a voter appears to vote at the polls, he or she is required to fill out an application to vote, which contains the same information as is contained on the poll list – the voter's name, address and month and date of birth. MCL 168.523. Michigan has never required citizens to present identification at the time they cast their vote.³ They have not been required to present photo identification nor have they been asked to present their voter registration card. People have been permitted to vote when the three pieces of information on the application to vote have matched the same three pieces of information on the poll list.

The clerks' greatest concern regarding possible implementation of the photo identification requirement prior to the November, 2006 election is that there is insufficient time prior to the election to implement a change of such significance. This change in the law will require everyone involved in the election process, from the Secretary of State down to the city and township clerks to undertake a major education and training effort.

II. Education of Voters as to the Photo Identification Requirement.

If and when photo identification for voters is implemented, the first task of all

³ There is one exception. A voter who registers to vote by mail must vote in person and present identification the first time he votes. MCL 168.509t(2). If the voter does not have this identification it can be furnished for up to six days after the election and the Secretary of State has issued guidance as to what identification is acceptable.

elections officials in the state will be to inform and educate the public about the requirement. In order to be effective, this education program will require communication in as many ways as possible at as many levels as possible. Public service announcements from the Secretary of State, the Governor, and other public officials will be needed. This publicity campaign should utilize all media outlets, including television, radio, newspapers, computer ads, and billboards. All advertising done to increase voter turnout should include the information that photo identification will be required of voters at the polls. In addition, it will be essential for the city and township clerks to send a notice to every voter by first class mail. The experience of the clerks in the past with regard to changes in election procedures or locations has taught them that in order to be effective communication must be repeated in a multitude of ways over a significant period of time.

This publicity campaign will be necessary to inform voters to bring photo identification to the polls. It will also have to inform them as to what photo identification is acceptable. The statute provides that a person offering to vote must identify himself with a driver's license, a state personal identification card, or "other generally recognized picture identification card." It will be necessary for the Secretary of State to issue guidance as to what documents will be acceptable under this latter category, just as the Secretary of State has issued guidance as to what identification is acceptable for those first time voters who are subject to the federal identification requirement. Both the voters and the elections inspectors will need this official guidance and this guidance will have to be created prior to the above described publicity campaign, since it will constitute an important aspect of the campaign.

This extensive publicity campaign will also have to inform the voters of how photo

identification can be obtained if they have neither a Michigan driver's license, a Michigan personal identification card, nor another photo identification card determined by the Secretary of State to be generally acceptable.

The majority of voters have a driver's license. Some have state issued identification cards. We do not know what percentage of voters have passports.⁴ Voters who do not have these common forms of photo identification are most likely to be those who do not drive and these, in turn, are most likely to be older, and/or lower income voters, or immigrants. These voters will have to be given sufficient time to obtain the official state personal identification cards, as well as careful instructions as to where and how these can be obtained. It must be recognized that the very fact that these voters do not drive may make it more difficult for them to travel to the locations where the identification cards are obtained.

III. Obtaining an Official State Personal Identification Card Will Be Time Consuming.

MCL 28.291, provides that in order to obtain an official state personal identification card a person must apply for the card at an office of the Secretary of State. The applicant must provide both proof of identity and proof of residency. See Secretary of State website notices, "Who is Eligible for a Personal Identification Card," and "Proof of Residency Required for Driver's License, ID Card Applicants," appended hereto as Exhibits 1 and 2.⁵

⁴ We assume here that a passport would be one of the generally recognized forms of picture identification referenced in the statute but the Secretary of State's guidance on this question will, as noted, be needed. We note that the statute refers to "picture identification card" and a passport, while it is a picture identification, is not a card.

⁵ Available at www.Michigan.gov/sos.

The statute requires that the applicant, "shall supply a birth certificate attesting to his age or other sufficient documents or identification as the secretary of state may require." Another notice of the Department of State, "Identification Requirements for an Original Driver License or Personal Identification Card," (Exhibit 3) however, sets forth the acceptable documents and states that a birth certificate alone will be not be sufficient. This publication says that a person over the age of 18 (meaning all persons who are securing the personal identification card for purposes of voting) must present *three* documents, at least one of which must be from the "primary group," while the other two can be from the primary or secondary group. The primary group includes a birth certificate, which must be certified and issued by a United States or Canadian governmental unit. A person not born in the U.S. or Canada is permitted to use other documents, such as a certificate of citizenship, certificate of naturalization, an employment authorization document, or a passport with a translation of the passport into English. The primary group also includes a United States or Canadian passport, and a military picture identification card, issued to the military person or to a dependent.

The secondary group includes documents such as a birth certificate from another country, a marriage license or divorce decree, which must have raised seals or be true copies, and assorted other documents. Any documents which are not written in English must be translated and the requirements for translation are set forth in the Secretary of State publications. The Secretary of State's website provides the instructions regarding the identification requirements in English, Spanish and Arabic, in recognition of the needs of the users.

It is clear from examining these requirements for obtaining a personal identification

card that it will be a very time consuming matter. The applicant must first locate and/or obtain the necessary supporting documents, must then apply for the identification card in person at an office of the Secretary of State, and must wait for the card to be mailed to him or her. The office of the Secretary of State is currently advising applicants that they can expect to receive their personal identification cards approximately three weeks after the application if all satisfactory documentation is complete.

Unless extensive education and publicity is given to the requirement, and unless voters are given extensive time to satisfy it, it certainly appears that this requirement will deprive some voters of the right to vote. The county, city and township clerks view the encouragement of maximum voter participation as a primary responsibility and they are opposed to the untimely implementation of new voting requirements which would discourage and diminish such participation.

IV. Education and Training of the Elections Inspectors.

An extensive education effort for the voters is only the first of the tasks which implementation of this photo identification law will require. Elections officials, from the Secretary of State to the local city and township clerks will also have to educate the elections inspectors about the identification requirement. The first order of business here will be for the Secretary of State to prepare and distribute written instructions and guidance. As discussed above, the secretary will need to provide guidance both to voters and to elections inspectors regarding what forms of photo identification are acceptable. Implementation of a photo identification requirement will require significant revisions to the Election Inspectors' Procedure Manual, a task which will be impossible if implementation takes place rapidly. In the latter instance, it will be necessary for the Secretary of State to

issue supplemental instructions which address the question of acceptable identification.

In addition, instructions and forms are needed regarding affidavits and challenges. The statute provides that if the voter does not have the required photo identification, "the individual shall sign an affidavit to that effect before an election inspector and be allowed to vote as otherwise provided in this act. However, an elector being allowed to vote without the identification required under this subsection is subject to challenge as provided in section 727." Regulations and guidance must be issued regarding this aspect of section 523. They are essential in order that these provisions can be consistently applied throughout the thousands of precincts in the state. The Secretary of State will have to provide the form for the affidavit which is mentioned in the statute. In addition, she will have to provide guidance about how this affidavit will be used. It is not yet clear whether an affidavit is a sufficient means for a voter without photo identification to attest that he is who he purports to be but lacks the requisite identification.

The statute says that after executing the affidavit the person will be allowed to vote but is "subject to challenge as provided in section 727." Section 727 provides that an elections inspector *shall* challenge an applicant to vote if he knows or has good reason to suspect that the person is not a qualified and registered voter. It also provides that a challenger *may* challenge the right of someone attempting to vote if he knows or has good reason to suspect that the person is not a registered voter. The Secretary of State will need to provide guidance as to the application of section 727 to a person who is unable to provide the requisite photo identification but who is listed on the polling list as a registered voter, has voted in the past, and who signs the required affidavit.

Once the Secretary of State has issued the revised and/or supplemental instructions

and guidance, the election inspectors will need to be trained about these new matters. If the implementation of the photo identification requirement is rushed, it is difficult to see when this instruction will take place. During the 2004 general election, the elections inspectors were faced with new and confusing instructions about the use of the provisional ballot procedure which had been mandated in the Help America Vote Act (HAVA), 42 USC 15301 et seq., and there was insufficient time for adequate training. This led to inconsistent use of the provisional ballots among the precincts and, in some cases, in election delays and disfranchisement of voters. There is concern that such problems could be repeated.

Furthermore, the clerks are concerned about the fact that other changes are also being introduced for the first time at the November, 2006 general election, an election when turnout is expected to be relatively high. This election will be the first general election in which the HAVA requirement, 42 USC 15421, for voting machines accessible to individuals with disabilities is implemented. Every precinct will have at least one voting machine which can be used by voters who are visually impaired, or lack the use of their hands, and clerks and elections inspectors are concerned about the complexity of this machine and about their ability to instruct and/or assist the disabled voters in its use. In addition, HAVA also required the elimination of certain voting technologies, including lever machines, and punch card ballots. Following the passage of this law, and of 2002 PA 91, the Secretary of State determined that all jurisdictions in the state would be required to use a uniform voting system. Three optical scan systems were determined to be acceptable and each county was required to decide which of those three would be used throughout the county. As a result, new voting equipment will be used in the 2006 general election in

many jurisdictions around the state.

The clerks know from their long experience that every change in technology and procedure in the polling places creates some anxiety and concern on the part of the elections inspectors, and often on the part of the voters. Everyone is more comfortable with the familiar. In November, 2006 the clerks and elections inspectors will already be dealing with new technology for disabled voters and with new machines for all voters in many jurisdictions. To impose any additional change, and particularly one of such magnitude as the photo identification requirement, has the potential for confusion and delay and, as discussed, for the disfranchisement of voters. Further, some clerks, in anticipation of these increased difficulties, are contemplating the hiring (and training) of additional elections inspectors, thereby increasing the costs to their jurisdictions.

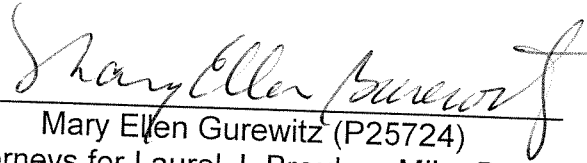
CONCLUSION AND RELIEF SOUGHT

In conclusion, the undersigned county, city and township clerks urge that if the photo identification requirement is determined to be constitutional it not be implemented until there is sufficient time 1) for the secretary of state to issue appropriate guidelines and instructions, 2) for an extensive publicity and education campaign to publicize the requirement, 3) for voters to secure the necessary identification, and 4) for adequate training of election inspectors in this new requirement.

Respectfully submitted,

SACHS WALDMAN, P.C.

By:



Mary Ellen Gurewitz (P25724)

Attorneys for Laurel J. Breuker, Mike Bryanton,
Cathy M. Garrett, Mary Hollinrake, Susan
Kaltenbach, Lawrence Kestenbaum, Daniel C.
Krueger, Chris Bedford, Judy A. Bigney, Karen
Brower, Marilyn Crosby, Linda L. Matz, Mary
Meines, Susan L. Morrow, Crystal Osterink,
Bonnie L. Shupe, Chris Swope, and Jean
Wahfield

1000 Farmer Street
Detroit, MI 48226
(313) 965-3464

Dated: July 18, 2006